

STATE OF MICHIGAN
COURT OF APPEALS

RONALD DEGEORGE, Personal Representative
of the ESTATE of ROBERT DEGEORGE,¹

UNPUBLISHED
April 15, 2003

Plaintiff/Counter-Defendant-
Appellant,

and

GREGORY ROHL,

Appellant,

v

PHILLIP WARHEIT,

Defendant/Counter-Plaintiff-
Appellee,

and

JEROME SILVER,

Counter-Plaintiff-Appellee.

No. 231953
Oakland Circuit Court
LC No. 99-015140-CK

Before: Hoekstra, P.J., and Bandstra and Saad, JJ.

PER CURIAM.

Plaintiff and his trial counsel appeal as of right from the final judgment of the trial court imposing sanctions on them for filing a frivolous cause of action. Plaintiff also challenges an evidentiary ruling, the grant of directed verdict on all counts of his third-amended complaint, and the denial of directed verdict with respect to the counterclaim filed against him. We affirm.

¹ In a May 31, 2002 order, this Court granted the motion to substitute Ronald DeGeorge, personal representative of the Estate of Robert DeGeorge, for the deceased, Robert DeGeorge.

This case arises from conflict and disputes amongst partial owners of a limited liability company known as T&T Land Clearing, L.L.C. The original three members of the company, Phillip Warheit, Jerome Silver, and plaintiff, committed equal capital outlay, although the amount was disputed, but because plaintiff lacked capital, his commitment consisted of land clearing equipment. Plaintiff brought suit against Warheit, challenging Warheit's actions as a member. Warheit and Silver's counterclaim alleged that plaintiff violated his contractual promises to them by pledging heavy equipment that did not belong to him.

Plaintiff and his trial counsel first argue that the trial court erred in finding plaintiff's claim to be frivolous. More specifically, they claim that the trial court improperly used post hoc reasoning.

A trial court's finding that a claim is frivolous will not be reversed on appeal unless clearly erroneous. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made. *Kitchen, supra* at 661-662.

MCR 2.625(A)(2) provides that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." Relevant to the instant case is MCL 600.2591(3)(a)(ii), which provides that the term "frivolous" includes the condition that "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true." A determination whether a claim is frivolous depends upon the particular circumstances of each case. *Kitchen, supra* at 662; *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). "To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs, supra* at 94.

Having examined the record, we are not left with a definite and firm conviction that the trial court made a mistake in determining that plaintiff had no reasonable basis to believe that the facts underlying plaintiff's legal position were in fact true. Despite plaintiff's and his trial counsel's argument to the contrary, we do not read the trial court's order as finding plaintiff's claim frivolous on the basis of events occurring at trial rather than on the facts existing at the time of the filing of the complaint. The trial court's ruling simply notes an abundance of claims for which plaintiff produced no evidence at trial, and thus highlights the extent of plaintiff's lack of a reasonable basis to believe that the facts underlying his position were true before filing suit. Plaintiff's inability to produce any evidence of those claims supports the trial court's conclusion that the case was frivolous from its inception and was properly considered. See *Davids v Davis*, 179 Mich App 72, 89-90; 445 NW2d 460 (1989) (In view of the evidence at trial, this Court was "unwilling to differ with the trial court's finding that the [counterplaintiffs'] counterclaim was anything but frivolous."); cf. *In re Pitre*, 202 Mich App 241, 244; 508 NW2d 140 (1993) (Probate court did not err in awarding attorney fees under MCR 2.114(E) where "[t]he discovery in this case demonstrated that petitioner's original claim against respondent must have been made without any inquiry into the facts, reasonable or otherwise."). In addition, other circumstances short of the trial evidence demonstrated plaintiff's lack of a reasonable basis to believe the facts were true before filing the complaint. For example, plaintiff drafted the original complaint as though T&T Land Clearing, L.L.C., were a corporation, representing to the court that plaintiff and defendant Phillip Warheit formed a corporation and filed its articles of

incorporation with a state department, when in fact no such document exists for a limited liability company. Further, plaintiff's nine-count original complaint devolved into a two-count third amended complaint before the trial under circumstances where it is apparent that his claims were brought without factual or legal basis. We conclude that the trial court did not clearly err in imposing sanctions against plaintiff and his trial counsel for filing and maintaining a frivolous lawsuit.

Next, plaintiff argues that the trial court erred in setting aside plaintiff's request for admissions. Specifically, plaintiff argues that the trial court improperly set aside all of the admissions even though Warheit's answers were months overdue and plaintiff was prejudiced because he relied on those admissions throughout discovery. We review for an abuse of discretion the trial court's decision concerning the amendment or withdrawal of an admission. *Medbury v Walsh*, 190 Mich App 554, 556; 476 NW2d 470 (1991); *Janczyk v Davis*, 125 Mich App 683, 691; 337 NW2d 272 (1983). "An abuse of discretion will only be found if an unprejudiced person, upon considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Medbury, supra* at 556-557.

Contrary to plaintiff's assertion, the record reveals that the trial court did not set aside *all* of the admissions, but only those aspects that Warheit sought to withdraw concerning capital contributions to the company. Further, we conclude that the trial court did not abuse its discretion in setting aside those aspects of the admission. A court may allow amendment or withdrawal of an admission for good cause. MCR 2.312(D)(1). Here, the record reveals that the failure to respond to the request was inadvertent, that the inadvertently admitted facts were in dispute, that deposition testimony taken months earlier and almost a year before trial contradicted the information in the admission, and that the case was still in the discovery phase. Given these circumstances, we cannot say that there was no justification or excuse for the trial court's ruling.

Plaintiff also argues that the trial court erred in granting defendants' motion for directed verdict and in denying his motion for directed verdict on the counterclaim. We review de novo a trial court's decision regarding a directed verdict. *Derbabian v S & C Snowplowing, Inc.*, 249 Mich App 695, 701; 644 NW2d 779 (2002).

When reviewing a trial court's decision on a motion for directed verdict, "we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Derbabian, supra* at 701-702. "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Id.* at 702. "If reasonable jurors could reach conclusions different than this Court, then this Court's judgment should not be substituted for the judgment of the jury." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 680; 645 NW2d 287 (2001).

With respect to the trial court's grant of directed verdict in favor of defendants, plaintiff has abandoned this issue on appeal. Plaintiff presents a limited argument on appeal with inadequate citation to the record and relevant law and without specifically addressing numerous reasons that the trial court gave for granting directed verdict. Most importantly, plaintiff failed to address damages in a meaningful argument, instead relegating his comments to a footnote

lacking in legal citation, despite the trial court's grant of directed verdict primarily on that basis. This Court will not "unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court.").

With respect to the trial court's denial of plaintiff's motion for directed verdict on the counterclaim, we find no error. Plaintiff argues that defendants had no standing "to maintain an action on the counterclaim for additional capital contributions" because, pursuant to section 3.3 of the operating agreement, only the company, not individuals, could maintain such an action. The trial court found this provision inapposite because the counterclaim dealt with a prior agreement. We agree. Moreover, even if section 3.3 were applicable here, it provides that the company "may" take action, it does not provide that that is the exclusive remedy or that an individual member is precluded from bringing his own action.

Plaintiff also argues that facts established at trial entitled him to a directed verdict on the counterclaim. An examination of the record reveals that in light of all the evidence presented at trial, plaintiff was not entitled to a directed verdict. Instead, the record reveals that plaintiff's motion dealt with capital contributions to the company and involved credibility issues, which the trial court properly found are for the jury to determine. See *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999) (questions of credibility are for the trier of fact to resolve); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) (it is the factfinder's responsibility to determine the credibility of trial testimony). Viewing the evidence presented in the light most favorable to defendants, granting defendants every reasonable inference, and resolving all conflicts in the evidence in favor of defendants, *Derbabian, supra* at 701-702, we conclude that questions of fact existed concerning the contributions and therefore the trial court did not err in denying a directed verdict.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Henry William Saad